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STATE OF UTAH Plaintiff and Appellee, v. JOHN LELEAE, Defendant adn Appellant : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	.A10 DOCKET NO. 981189
Plaintiff/Appellee,	:	Case No. 981189-CA
v.	:	
JOHN LELEAE,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

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APPEAL FROM A CONVICTION FOR AGGRAVATED ASSAULT, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-103 (1995), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE TYRONE E. MEDLEY, PRESIDING.

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction for aggravated assault, a second degree felony, in violation of Utah Code Ann. § 76-5-103 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Tyrone E. Medley, presiding. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF THE ISSUES ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. Was there sufficient evidence of "serious bodily injury" to convict defendant of aggravated assault? "[The reviewing] court reverses a jury verdict only if, after viewing all the evidence and inferences therefrom in the light most favorable to that verdict, it finds the evidence '" sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime

of which he was convicted."'" State v. Baker, 963 P.2d 801, 809 (Utah App. 1998) (quoting State v. Span, 819 P.2d 329, 332 (Utah 1991) (quoting State v. Petree, 659 P.2d 443, 444 (Utah 1983))).

2. Did the trial court abuse its discretion in refusing to voir dire the jury panel with questions proposed by defendant and in denying a challenge to a juror for cause? A trial court's decision to limit questioning in jury voir dire is reviewed for abuse of discretion. State v. Piansiaksone, 954 P.2d 861, 868 (Utah 1998). See also State v. Ellifritz, 835 P.2d 170, 174 (Utah App. 1992) (trial court's rejection of a challenge for cause to a particular juror reviewed for abuse of broad discretion to impanel a fair and impartial jury).

3. Did the trial court abuse its discretion under rule 106, Utah Rules of Evidence, in refusing to admit defendant's inadmissible recorded hearsay statements requested to purportedly clarify a witness's testimony? In reviewing a trial court's rulings on evidence, the appellate court will generally allow the trial court "a good deal of discretion." State v. Pena, 869 P.2d 932, 938 (Utah 1994) (citing Russell v. Russell, 852 P.2d 997, 999 (Utah 1993) ("Rule 611(a) allows the court to 'exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, [and] (2) avoid needless consumption of time. . . .' Utah R. Evid. 611(a)."). See J.Weinstein, M. Berger, & J. McLaughlin, Weinstein's Evidence ¶ 106[01] at. p. 106-4 (noting that rule 611(a) provides control over testimonial proof equivalent to rule 106's control over

writings and recorded statements).

4. Should this Court defer consideration of defendant's constitutional challenges to Utah Code Ann. § 76-3-203.1 (1995) ("group criminal activities" enhancement) until the Utah Supreme Court rules on the State's petition for rehearing in State v. Lopes, No. 960551 (Utah March 16, 1999)? This issue is a matter of this Court's discretion.

5. Is the offense of conspiracy the exact equivalent of "in concert" criminal liability, such that defendant was entitled to the lesser sentence for conspiracy under State v. Shondel, 453 P.2d 146, 148 (Utah 1969). "'[R]eview under the Shondel rule "focuses on the trial court's legal conclusions, which we review under a correction-of-error standard, according no particular deference to the trial court's ruling."'" State v. Fisher, 972 P.2d 90, 98 (Utah App. 1998) (citing State v. Kent, 945 P.2d 145, 146 (Utah Ct. App. 1997) (quoting State v. Vogt, 824 P.2d 455, 456 (Utah Ct. App. 1991))).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Determinative constitutional provisions, statutes, and rules are attached at Addendum A.

STATEMENT OF THE CASE

Defendant, John Leleae, was charged with attempted criminal homicide or, in the alternative, aggravated assault (R. 53-56). A jury convicted defendant of aggravated assault (R. 206). The trial court sentenced defendant to a statutory term, enhanced pursuant to Utah Code Ann. § 76-3-203.1 (1995) ("group criminal activities

enhancement") to a six-to-fifteen year term in the Utah State Prison (R. 351-52).

STATEMENT OF THE FACTS

At about 9:45 p.m. on May 10, 1997, Kenny Brems was driving his Ford pickup truck near the intersection of 3500 South and 4800 West in West Valley City, listening to the radio, headed home (R. 378:93-98). As Brems turned east onto 3500 South, he noticed a blue Chevrolet Monte Carlo in the lane to his right (R. 378:97, 168). As he approached 4400 West, just before the point where construction barricades forced a narrowing of the road from four to only two lanes, Brems heard two "pops" in close succession (R. 378:98, 101). Not knowing what the popping sounds were, and thinking that something might be wrong with his truck, Brems turned the radio down. Just as he entered the intersection, Brems heard a third "pop," at which instant the rear window of his truck shattered (R. 378:98-102). Brems instantly recognized that someone was shooting at him (R. 378:102).

Intending to disable the smaller Monte Carlo, Brems backed his pickup into it. Amid spinning wheels, noise and smoke, Brems forced the Monte Carlo back into another car, but only succeeded in stalling his truck (R. 378:103-04). Too scared to even try to start his truck, Brems jumped out and began to run down 3500 South to escape and get some help. At the same moment, the Brems saw two male Pacific Islanders jump out from the driver's side of the Monte Carlo. One of them, who Brems identified as defendant, had a gun (R. 378:104-05, 112-114). One of the men wore light-colored or

tan shorts and a flannel shirt (R. 378:113).

Unsuccessful in getting help from the first four drivers he tried, Brems found Earl Bramhall in his car, and screamed at him to call the police, which Brimhall was already doing on his cellular phone (R. 378:105, 166-67). At this point, Brems relaxed because the Monte Carlo and its occupants were some distance away, and other people were beginning to gather (R. 378:106). However, Brems watched Brimhall's eyes get bigger and heard him yell, "Look out! Look out!" (R. 378:106). Brems turned and saw the Monte Carlo come around his truck, run over two barricades, and bear down on him (R. 378:106, 168). Brems realized that his pursuers were trying to hit him. He tried to jump out of the way, but the Monte Carlo hit him, flipping him over and onto the ground (R. 378:106-07).

Again, defendant still holding a gun and the second man, jumped out of the Monte Carlo. The second man asked why Brems had backed into his car. As Brems asserted that they had been shooting at him, a third occupant of the car got out, at which point all Brems remembers is being beaten and begging for his life (R. 378:107, 112-15, 134).[1] Although Brems knew that he was being attacked by more than one assailant, he could not be sure whether defendant was one of them (R. 378:138). Brems remembered that the

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[1] Although Brems did not know the names of his assailants, at trial he correctly identified defendant by his long hair, in a pony tail at the time of the incident (R. 378: 113-14, 145-46), and defendant's cohorts, Edwin Seumanu (who was angry about the Monte Carlo), by his "bushy, straight up" hair (State's Ex. 25; R. 378:107, 114, 143-44; 379:124), and Viliamu Seumano by his hair and similar appearance to his brother Edwin (State's Ex. 24; R. 378:115, 144-45).

individual who initially began to beat him as the companion of defendant, the individual with the gun (R. 378:114-15).

Brems suffered some minor head injuries and a broken jaw. Surgery was performed at St. Mark's Hospital, where braces and wires were applied to his teeth and mouth, fully immobilizing his jaw and preventing him from opening his mouth at all for a month and a half (R. 378:108-09). Brems also had a front tooth pulled so that he could ingest food through a straw (R. 378:109). During this period, Brems could eat nothing but liquified foods which he ingested by squeezing through the spaces between his teeth (R. 378:109). Brems lost about twenty pounds during this period, at the end of which he was losing about one pound each day (R. 378:110-11).

Brems tooth was put back in about a week after his jaw was unwired (R. 378:109-10). It took "quite a while" for Brems' jaw to recover. After the wires were removed, it was "real hard" to eat, and he was unable to begin eating solid food for another two or three weeks. However, while his jaw felt "pretty good" at time of trial, more than six months after the incident, Brems, a serviceman by profession, was still unable to hold a flashlight in his mouth on account of the pain (R. 378:110).

When Brems retrieved his truck a few days after the incident, he found a bullet hole in the front part of the sleeper compartment, and the differential also had a bullet ding (R. 378:116).

Kevin Lubbers was the driver of the car into which Brems's truck forced the

Monte Carlo (R. 378:149-50). After the crash, he saw three people, one of whom was a passenger who had a gun, get out of the Monte Carlo and start to chase the driver of the truck (R. 378:151-52). He ran to the nearby Conoco station, but other witnesses were already calling the police (R. 378:152). He then saw the Monte Carlo pull forward and proceed to hit another car. From a distance of about fifty yards he saw three individuals chase Brems. Although he was not close enough to see which of the truck driver's pursuers was assaulting Brems, "I did see that they were all beating up on this guy" (R. 378:153, 161).

Earl Bramhall, driver of the car into which the Monte Carlo smashed, confirmed that he observed the Monte Carlo bear down on Brems as Brems sought help from him (R. 378:168). The Monte Carlo took out the whole left side of his car and hit Brems in the legs, knocking him to the ground (R. 378:168-71). Three "Islanders or Samoans" were in the Monte Carlo. The driver hollered at Brems, "I am the motherfucker that tried to blow your head off," and he and the front seat passenger jumped out of the car and began beating Brems as he lay on the ground (R. 378:169-71, 176). The rear seat passenger also exited, holding a large caliber handgun, which he threw back into the car before joining his companions in beating up Brems (R. 378:170-71). Although the fracas moved toward a fence thirty to forty feet from Bramhall's car, Bramhall identified defendant to police at the scene of the incident as a participant in the victim's beating (R. 378:181, 186-87).

Duane Banks, also stopped in his car, witnessed the Monte Carlo hit Brems, after which three or four Pacific Islanders "came pouring out of the car," caught Brems as he limped away, and pulled him up against a fence and started beating him up (R. 378:187-91). He saw no indication that any of Brems three assailants tried to stop the beating (R. 378:191).

Officer Julia Jorgenson of the West Valley City Police Department, arrived at the scene within a minute and a half of receiving a "shots fired, man-with-a-gun call (R. 378: 205-08). There she encountered a large group of very angry men consisting of about five Polynesians and two Caucasians (R. 378:208-09). Two of the men wore airline baggage handler type uniforms, the other three wore oversized clothing (R. 378:209). These latter three, whom she identified as defendant and the Seumanu brothers, "were very upset, very angry . . . clinching their fists and flexing their shoulders, as we were trying to bring them away from the fence and towards us" (R. 378:209, 218-20; State's Ex. 24 and 25; Def.'s Ex. 1). Officer Jorgenson, concerned that these three men were still moving around and disobeying police commands, immediately retrieved the .44 magnum revolver she saw on the passenger seat of the Monte Carlo (R. 378:210). Examining the gun, she found five spent shell casings (R. 378:211).

Officer William McCarthy, responding to a radio call, arrived at the scene first, immediately before Officer Jorgenson (R. 378:214, 221-23). He saw a woman leading Brems away and three Islanders, who he identified as defendant and the Seumanu

brothers, who appeared to be fighting with two other Islanders wearing Delta airline uniforms, who were attempting to restrain defendant and his cohorts (R. 378:223-24; R. 379:15; State's Ex. 24 and 25; Def.'s Ex. 1). Officer McCarthy ordered all five to sit on the curb (R. 378:224). The two Islanders in the Delta Airlines uniforms were "very compliant" (R. 378:225). However, defendant and his companions would not follow any directions until another officer arrived with a police dog (R. 378:225).

Following the arrest of defendant and the Seumanu brothers, Officer McCarthy put defendant and Viliamu in his patrol car, which contained video equipment that had been automatically activated when the overheads lights were turned on (R. 378: 228-29; R. 379:23). Officer McCarthy told defendant and his companion that they had no expectation of privacy in his patrol car (R. 378:229). Defendant's conversation with Viliamu was recorded and thereafter transcribed (R. 379:8-10; 379:29; State's Ex. 29).

Kevin Nudd, detective with the West Valley City Police Department, arrived at the scene sometime after 10:00 p.m. (R. 379:21, 23). He was informed by Officer Terrell that defendant and Viliamu Seumanu were in Officer McCarthy's patrol car (R. 379:23). He identified the bullet that was retrieved from the headliner of Brems's truck (R. 379:25-26). He also noted that the .44 magnum Black Hawk Ruger retrieved from the Monte Carlo is one of the largest caliber handguns made (R. 379:45).

Detective Nudd also interviewed defendant the night of the incident (R. 379:28-29). After being read and then waiving his Miranda rights, defendant first denied even

being in the Monte Carlo and claimed that he was a pedestrian who had witnessed the automobile accident (R. 379:29-31). Although, defendant claimed also that he had just met the Seumanu brothers that night in a park, he changed his story about how he arrived at the scene several times during the interview (R. 379:31). Defendant then claimed that he approached two guys in a car, that one of them had fired a gun, and that after directing the wielder of the gun to put it back in the car he got a hold of it and put it in the car himself (R. 379: 33-34). Defendant went on to say that these two guys got out of the car, chased the victim and began beating him up when he interceded to break up the fight (R. 379:31-34).

Upon Detective Nudd's informing defendant that his conversation in Officer McCarthy's patrol car had been videotaped, defendant claimed he would tell the truth and changed his story concerning his involvement in the incident (R. 379:35-36). Defendant claimed that Viliamu was "always getting into situations," and blamed Viliamu for getting him into the situation (R. 379:36). Defendant claimed he had been drinking beer with the Seumanus in a park and then gotten a ride in the Monte Carlo from its owner, Edwin, the same person who had shot the gun (R. 379:36-37). Defendant said that later he took over the driving because Edwin was drunk and that he was driving during the shooting (R. 379:37). After Brems backed his truck into the their car, Edwin and Viliamu chased Brems, but returned to their car, at which point Edwin drove (R. 379:37). Edwin, defendant claimed, tried to hit Brems, after which Edwin and Viliamu got out of the car

and began assaulting Brems (R. 379:38). Defendant again asserted that he tried to pull Edwin and Viliamu off Brems, expressing to Detective Nudd his ambivalence about supporting his friends by either taking part in the beating or refraining (R. 379:38-40).[2]

Debra Bryant testified for the defense that she witnessed the incident from the point at which Brems backed into the Monte Carlo (R. 379:80-83). After seeing the Monte Carlo hit Bramhall's car, she saw the Seumanu brothers assault the victim, constantly hitting him in the face (R. 379:83, 86-87; Def.'s Ex. 2 and 4). She entreated that they stop, begging them to allow the police to handle the matter while grabbing at one of the attacker's arms (R. 379:84). Notwithstanding her status as a defense witness, Ms. Byrant testified that at some point a third person appeared, who also beat the victim in the face (R. 379:85, 87).

Testifying for defendant, Edwin Seumanu stated that he left a park in his blue Monte Carlo with his brother, Viliamu, and defendant, but, having drunk "a lot" of beer, turned the driving over to defendant. He acknowledged that there was a gun beneath the driver's seat (R. 379:94-99, 111-12). While they were driving, a truck kept coming up and then dropping back behind his car, kept "highlighting" his car, to wit: repeatedly switching from low to high beams, and then forced its way in front of his car (R. 379:99-

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[2] Defendant's asserted ambivalent response to the assault on Brems is the subject of defendant's claim (Point III) that the trial court erred in denying his request to introduce additional portions of his statement to Detective Nudd. A more complete rendition of the facts related to that claim is set out at Point III of this brief.

101). At that point Edwin started firing his gun "straight up in the air" (R. 379:101, 112). Angered by Brems backing into his car, Edwin jumped out of the car, along with defendant (R. 379:102). Abandoning an attempt to catch the fleeing Brems, Edwin returned to the car, got into the driver's seat, and began searching for the victim (R. 379:104-06). Seeing the victim next to a car, Edwin turned the Monte Carlo towards Brems only to block his escape, but in trying to stop the car "was still kind of rolling a little bit" (R. 379:107). Edwin then jumped out of the car, grabbed the victim and began beating him. Edwin's brother joined him in beating the victim (R. 379:108-09). Edwin said that he did not see defendant there; however, he also acknowledged that he did not notice what defendant was doing and that it was not defendant, but rather two other Polynesians who pulled him off the victim (R. 379:109, 114-16).

Defendant testified that he just met the Seumanu brothers on the night of May 10 (R. 381:14-15). His testimony generally tracked Edwin's story to the point where Edwin fired the gun, although defendant acknowledged that it was he who first cut Brems off (R. 381:17-24, 66-67). At that point, defendant asserted that he really wanted to turn the car around, but was afraid Edwin might shoot him (R. 381:24). When Brems backed into the Monte Carlo, defendant got out and examined the damage (R. 381:28). He also retrieved the gun from Edwin, who was out of the car and threw the gun back into the car (R. 381:29-30). Defendant asserted that when Edwin and Viliamu caught up with Brems and beat him, defendant pulled Edwin off and told Edwin, "That's enough" (R. 381:35-

41). Defendant also denied encouraging or assisting Edwin in shooting or assaulting Brems (R. 381:57-58). However, on cross examination, defendant acknowledged that he continued to drive along the same path as Edwin fired the gun out the window three times (R. 381:69-72).[3] Upon being confronted with a transcription of his tape recorded conversation with Viliamu while they were in police car, defendant also acknowledged concocting a story in which defendant was standing on the corner and then tried to break up the fight (R. 381:91-93).

On rebuttal, in addition to pointing out a series of prior inconsistent statements Edwin made, Detective Nudd testified that Edwin also told him that defendant would "help him get [the] victim" (R. 381:124).

SUMMARY OF ARGUMENT

POINT I - There was sufficient evidence of serious bodily injury to support defendant's conviction for aggravated assault. As a result of a brutal assault by defendant and his accomplices, the victim suffered a broken jaw which had to be wired closed for six weeks and which, at the time of trial more than six months later, left the victim with some debilitation. Under the plain language of the statute and substantial relevant case law from other jurisdictions, the injury suffered by the victim was "protracted impairment to any bodily organ" sufficient to establish "serious bodily injury."

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[3] Detective Nudd testified that in order to fire the .44 magnum Ruger, it was necessary to cock the gun by first pulling the hammer back (R. 379:45). Defendant denied seeing Edwin cock the gun before each shot (R. 381:72).

POINT II - The court properly rejected three of defendant's proposed voir dire questions which asked prospective jurors whether they could weigh and credit defendant's testimony the same as it would other witnesses, whether a juror could remain resolute in the face of a majority holding a contrary opinion, and whether the juror could follow the cautionary eyewitness instruction. Since the trial court repeatedly inquired to its satisfaction whether the jury could weigh the evidence fairly and impartially and admonished the jury that it must follow the court's instructions on the law, defendant was given a sufficient opportunity to intelligently exercise his peremptory strikes. Also, the court did not abuse its discretion in refusing to remove for cause a juror having only a remote and insubstantial connection with a juror who affirmed his ability to be fair and impartial.

POINT III - The trial court did not abuse its discretion in refusing to admit parts of defendant's post-arrest interview statement, requested by defendant to purportedly clarify a detective's testimony, under rule 106, Utah Rules of Evidence. Because rule 106 applies only to writings or recorded statements, and because the remarks sought to be admitted were inadmissible hearsay, rule 106 does not apply. Also, the detective's testimony accurately summarized defendant's post-arrest comments, which would have been prejudicial if admitted in their entirety.

POINT IV - The State requests that this Court defer ruling on defendant's challenges to Utah Code Ann. § 76-3-203.1 (1995) ("group criminal activities" enhancement) until the

Utah Supreme Court rules on the State's petition for rehearing in State v. Lopes, No. 960551 (Utah March 16, 1999) (requiring proof to a jury beyond reasonable doubt of "in concert" element of "new crime"). Alternatively, any error in consequence of Lopes should be considered harmless beyond a reasonable doubt because at the time of defendant's sentencing his accomplices had pleaded guilty to offenses rising out of the same criminal episode, thereby establishing beyond a reasonable doubt defendant's participation with two or more individuals.

POINT V - Defendant is not entitled to a lesser sentence under the Shondel rule because conspiracy and "in concert" criminal liability are not equivalent offenses. Conspiracy requires proof of an agreement to commit a crime, an element absent from accomplice liability.

ARGUMENT

POINT I - THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT THE VICTIM SUFFERED SERIOUS BODILY INJURY

Defendant argues that the trial court erred in denying his motion to dismiss (R. 379:77) in which he claimed that the evidence of aggravated assault was insufficient because the victim did not suffer "serious bodily injury," i.e. "protracted loss or impairment," as defined by the statute. Br. of App. at 14-18. However, not only is defendant's logic in support of his argument flawed, but also the plain language of the statute clearly embraces the injuries suffered by the victim, as a number of other state courts construing virtually identical statutory language have found.

In order to successfully challenge a jury's verdict the reviewing court must find that the evidence and inferences based on that evidence were so "inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Petree, 659 P.2d 443, 444 (Utah 1983), superseded by rule on other grounds, State v. Walker, 743 P.2d 191 (Utah 1987) . In undertaking such review, the appellate court will "view the evidence, along with the reasonable inferences from it, in the light most favorable to the verdict." State v. Moore, 802 P.2d 732, 738 (Utah pp. 1990) (citation omitted). "[S]o long as some evidence and reasonable inferences support the jury's findings, [the reviewing court] will not disturb them." Id. (citing State v. Booker, 709 P.2d 342, 345 (Utah 1985)).

In this case, Brems suffered the following injuries and impairments:

- minor head injuries and a broken jaw (R. 378:108-09);
- surgery to apply braces and wires to his teeth, fully immobilizing his jaw and preventing him from opening his mouth at all for a month and a half (R. 378:108-09);
- removal of a front tooth to allow ingestion of food through a straw (R. 378:109);
- diet limited to only liquified foods, ingested by squeezing through the spaces between his teeth (R. 378:109);
- lost of about twenty pounds during this period, at the end of which Brems was losing about one pound each day (R. 378:110-11);
- difficulty in eating after removal of wires and inability to eat solid for an additional two to three weeks (R. 378:110);
- jaw "pretty good" at time of trial, more than six months after the incident, but Brems, a serviceman by profession, was still unable to hold a flashlight in his mouth on account of the pain (R. 378:110).

"A person commits aggravated assault if he commits assault as defined in Section

76-5-102 and he intentionally causes serious bodily injury to another[.]" Utah Code Ann. § 76-5-103(1)(a) (Supp. 1998).[4] "'Serious bodily injury' means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death." Utah Code Ann. § 76-1-601(10) (Supp. 1998); see State v. Gardner, 947 P.2d 630, 651 (Utah 1997) ("A broken arm, foot, or even finger would satisfy [Utah Code Ann. § 76-5-103.5(2)(b)'s] definition of serious bodily injury as 'protracted loss or impairment of the function of any bodily member,'" citing Utah Code Ann. § 76-1-601(10)).

Recognizing that his conviction for aggravated assault could be based only on a showing of "protracted loss or impairment of the function of any bodily member," defendant essentially claims that the phrase is ambiguous because it does not adequately define the period of time embraced by the term "protracted." Br. of App. at 16. Purporting to clarify the term, defendant urges this Court to apply the doctrine of *noscitur a sociis,* "it is known from its associates," whereby "protracted impairment" denotes injury equal to the other terms defining "serious bodily injury," and is distinct from those terms defining "substantial bodily injury," which also should denote equivalent injuries.[5]

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[4] Defendant was not charged under the alternative variant for aggravated assault (R. 54). See Utah Code Ann. § 76-5-103(1)(b) (defendant "under circumstances not amounting to a violation of subsection (1)(a), [defendant] uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury").

[5] "'Substantial bodily injury' means bodily injury, not amounting to serious bodily injury, that creates or causes protracted physical pain, temporary disfigurement, or temporary loss or impairment of the function of any bodily member or organ." Utah

Br. of App. at 17. From this analysis defendant gratuitously asserts that the impairment Brems suffered, to wit: a broken jaw wired shut for six weeks during which he loss twenty pounds, was not serious bodily injury equivalent to that which "creates serious permanent disfigurement . . . or creates a substantial risk of death," but rather "temporary loss or impairment" comparable to "protracted physical pain [or] temporary disfigurement." Br. of App. at 17-18. In other words, the victim suffered only "substantial" but not "serious" bodily injury. Br. of App. at 18. Defendant concludes by providing a per se definition for "serious bodily injury" as it may pertain to a broken bone: "In sum, any broken bone which is not life threatening and heals normally in the usual time frame should be considered a temporary loss or impairment of function, making the injury 'substantial bodily injury.'" Br. of App. at 18. Defendant's argument fails for several reasons.

"A fundamental rule of statutory construction is that statutes are to be construed according to their plain language." O'Keefe v. Utah State Retirement Bd., 956 P.2d 279, 281 (Utah 1998) (citation omitted). "Only if the language of a statute is ambiguous do we resort to other modes of construction." Id. "Furthermore, unambiguous language may not be interpreted to contradict its plain meaning." Id. "A corollary of this rule is that 'a statutory term should be interpreted and applied according to its usually accepted meaning, where the ordinary meaning of the term results in an application that is neither

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Code Ann. § 76-1-601(11)(Supp. 1998).

unreasonably confused, inoperable, nor in blatant contradiction of the express purpose of the statute.'" Id.

"Protracted impairment," notwithstanding an understandable lack of absolute precision, is not ambiguous, but rather has a clearly understood meaning. See 2A Norman J. Singer, Sutherland Statutory Construction § 47.16 (5th ed. 1992) ("The rule [noscitur a sociis] will not be applied where there is no ambiguity . . . ."). Indeed, several courts have rejected claims challenging the sufficiency of evidence of "protracted impairment" under virtually identical aggravated assault statutes by simple resort to dictionary definition.[6]

Even if there were some ambiguity in the term "protracted impairment," at least

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[6] Walker v. State, 742 P.2d 790, 791 (Alaska Ct. App. 1987) ("Protracted is defined as 'to draw out or lengthen in time or space.'") (quoting Webster's Third New International Dictionary 1826 (1966)), State v. Welton, 300 N.W.2d 157, 160 (Iowa 1981) (same); State v. Mentola, 691 S.W.2d 420, 422 (Mo. Ct. App. 1985) (citing dictionary definition and noting that "protracted" is "[o]bviously . . . something short of permanent, but more than of short duration. What is considered protracted depends on the circumstances."); State v. Pettit, 976 S.W.2d 585, 592 (Mo. Ct. App. 1998) (same).

Additionally, courts applying the language of their aggravated assault statutes which contain virtually identical operative phrases to that of the Utah "serious bodily injury" definition ("protracted loss or impairment of the function of any bodily member or organ") have uniformly found evidence sufficient on facts remarkably similar to those in this case: Walker, 742 P.2d at 791 (broken jaw wired shut for six weeks preventing victim from chewing); People v. Fosselman, 659 P.2d 1144, 1148 (Cal. 1983) (broken jaw wired shut for three weeks); Welton, 300 N.W.2d at 159-61 (broken jaw wired shut preventing chewing of food); State v. Diaz, 612 So. 2d 1019, 1021-23 (La. Ct. App. 1993) (fractured jaw wired together and immobilized for seven weeks necessitating restricted liquid diet); State v. Bridgeforth, 357 N.W.2d 393, 394 (Minn. Ct. App. 1984) (loss of tooth); Pettit, 976 S.W.2d at 592 (inability to walk without severe pain for three weeks after gunshot wound); Mentola, 691 S.W.2d at 421-22 (broken jaw wired shut for six weeks still felt numb and painful at time of trial); Commonw. v. Nichols, 692 A.2d 181, 184 (Pa. Super. Ct. 1997) (broken jaw wired shut for six weeks during which victim could take only liquid food through a straw); Commonw. v. Davis, 406 A.2d 1087, 1089 (Pa. Super. Ct. 1979) (multiply fractured jaw wired closed for six weeks).

one court has rejected substantially the same analysis proposed by defendant in this case. In Welton, the defendant was convicted of "willful injury," the precise equivalent of aggravated assault as defined sections 76-5-103 and 76-1-601, by breaking the victim's jaw. Welton, 300 N.W.2d at 159. As a result of the attack, the victim's jaw was wired shut for six weeks, during which time the victim ingested only liquid food through her teeth and lost twenty-five pounds. Id. Challenging the evidence showing a "protracted loss or impairment" sufficient to constitute willful injury, the defendant argued that the victim's injuries did not rise to the level of the other definitions embraced by the statutory definition of "serious bodily injury," to wit: "disabling mental illness, substantial risk of death, and serious permanent disfigurement." Id. at 160 (citing Iowa Code § 702.18 (1979)). The Iowa Court of Appeals rejected the defendant's argument, noting that "[protracted loss or impairment of the function of any bodily member or organ] is consistent with the other three definitions." Id. Effectively contemplating defendant's argument in this case, the Welton court concluded:

> Standard rules are difficult to formulate, and each case must be determined by its own peculiar facts. All bone fracture may not constitute a "protracted loss or impairment." However, the fracture in this case, which substantially impaired the victim's health, made a jury question under the statute.

Id. at 161. See also State v. Kelly, 942 P.2d 579, 584 (Kan. 1997) (noting that whether harm is sufficiently "great" to constitute aggravated battery is "generally a question of fact for the jury") (citation omitted). In this case, the trial court also correctly recognized

that the evidence was sufficient to submit the charge to the jury (R. 379:76-77).

However, even if defendant's statutory construction argument were accepted, his insufficiency claim would fail on the facts. At the time of trial, more than six months after the incident, Brems' jaw was still not completely healed, evidenced by his inability to hold a flashlight in his mouth on account of the pain, a condition that impaired his ability to work (R. 378:110). In sum, there was sufficient evidence to show that defendant's acts caused the victim to suffer protracted impairment in the use of his jaw.

POINT II - THE VOIR DIRE CONDUCTED BY THE COURT PROVIDED THE DEFENDANT WITH A FAIR TRIAL AND WAS WELL WITHIN THE COURT'S DISCRETION.

A. The Court's Voir Dire Covered the Legitimate Subjects of Inquiry Addressed in Defendant's Supplemental Voir Dire, Allowing Defendant an Adequate Opportunity to Evaluate the Jurors.

Defendant appeals the decision of the trial court not to ask three supplemental questions he proposed for jury voir dire:

> 26. If Mr. Leleae were to testify, would you give his testimony the same weight and credit that you would give to any other witness?
>
> 41. If, after hearing the evidence, you came to the conclusion that the prosecution had not proven the guilt of the accused beyond a reasonable doubt, and you found that at majority of the jurors believed the defendant was guilty, would you change your verdict only because you were in the minority?
>
> 49. You will later be instructed by the judge that the identification of a person as the perpetrator of a crime is an expression of belief or impression by the witness, and that many factors affect the accuracy of the identification. Do any of you believe that an eyewitness can never make a mistake? Would any of you be unable to follow the judge's instructions about looking at various factors which could affect the accuracy of eyewitness identification?

(R. 139-146; R. 378:74). See Br. of App. at 18-21.

This Court reviews challenges to the trial court's management of jury voir dire under an abuse of discretion standard. Barrett v. Peterson, 868 P.2d 96, 98 (Utah Ct. App. 1993). The scope and conduct of voir dire examination is within the discretion of the trial judge. State v. James, 819 P.2d 781, 798 (Utah 1991). "For a court's exercise of discretion in disallowing voir dire questions to be overturned, appellant must show that the abuse of discretion rose to the level of reversible error." State v. Hall, 797 P.2d 470, 472 (Utah App. 1990) (citing State v. Pascoe, 774 P.2d 512, 514 (Utah 1989)), cert. denied, 804 P.2d 1232 (Utah 1990).

In James the court stated that "while questions covering possible bias of jurors must cover the subject involved, the questions asked of jurors do not need to follow any specific formula to pass constitutional muster." James, 819 P.2d at 797 (Utah 1991) (citing Mu'Min v. Virginia, 500 U.S. 415, 431 (1991)) (footnotes omitted). However, concluding the defendant's constitutional rights were not violated does not answer the question of whether the trial court improperly limited voir dire. State v. Piansiaksone, 954 P.2d 861, 867 (Utah 1998).

Voir dire serves two distinct purposes: 1) to allow counsel to uncover biases of individual jurors sufficient to support a for-cause challenge and 2) to gather information enabling counsel to intelligently use peremptory challenges. Barrett v. Peterson, 868 P.2d 96, 98 (Utah Ct. App. 1993) (citing State v. Sherard, 818 P.2d 554, 558 (Utah App.1991),

cert. denied, 843 P.2d 516 (Utah 1992), and Doe v. Hafen, 772 P.2d 456, 457 (Utah App. 1989)). "[T]rial courts can and should conduct voir dire proceedings in a way which not only meets constitutional requirements, but also enables litigants . . . to intelligently exercise peremptory challenges and which attempts, as much as possible, to eliminate bias and prejudice from the trial proceedings." Piansiaksone, 954 P.2d at 867. Defendant fails not only to show he was denied his constitutional rights, but also that he was deprived of an intelligent exercise of his peremptory challenges.

The first question regards the ability of the potential jurors to fairly and impartially evaluate defendant's testimony. This question was unnecessary. The court sufficiently inquired into the jurors' ability to fairly and impartially judge witness testimony. The court told jurors that their obligation as jurors was "to fairly and impartially listen to the testimonies of the various witnesses," and then "to fairly and impartially determine the credibility of those witnesses" and "to fairly and impartially determine what weight should be given to the testimony . . . " (R. 378: 8). The court asked the potential jurors if, following these obligations, they would not be able to apply the law as given to them by the court (R. 378: 10). No juror indicated that he or she could not comply (R. 378: 10).

The second question was unnecessary for the defense to evaluate the jury panel for cause or peremptory challenges. The jury panel was admonished several times to keep an open mind and to evaluate the evidence fairly and impartially, and when asked if they would be able to follow the law with these obligations, no potential juror indicated

signaled his or her dissent (R. 378: 8, 10, 70). Additionally, this question was not to probe for possible or actual bias. Voir dire should be conducted in a manner that "enable[s] litigants and their counsel to intelligently exercise peremptory challenges and which attempts, as much as possible, to eliminate bias and prejudice from the trial proceeding." James, 819 P.2d at 798 (Utah 1991). Moreover, authority cited by defendant tends to reject, rather than support, the propriety of this question. See Allen v. United States, 164 U.S. 492, 499-502 (1896) (instructing jury to keep an open mind in the face of opposing majority viewpoint).

The last question was unnecessary for the defense to evaluate the potential jurors. In Piansiaksone, the court held that the trial court did not abuse its discretion in failing to ask two questions that were aimed at discovering jurors who might be favorable to the defendant's theory of the case. Piansiaksone, 954 P.2d at 868. The questions asked potential jurors if they were "familiar with a circumstance in which a person accepted responsibility for the actions of someone else to shield the other person from blame" and "[w]hy would a person take responsibility for someone else." Id. 867 n.4. The court held that although these two questions were appropriately within the scope of voir dire, "the trial judge has the greatest freedom to exclude them." Id. (emphasis added).

The rejected questions in Piansiaksone are similar to the question requested by defense counsel asking potential jurors if they believed that an eyewitness can ever make a mistake. Although the question gave lip service to the requirement that the jury follow

the court's instructions, it was plainly intended to identify jurors who would be amenable to the defendant's theory of "mistaken identity". Even if the question appropriately probed a juror's potential biases concerning the reliability of eyewitness testimony, it was subsumed by the court's firm directive that the jury follow the instructions as given by the court, whether or not the juror believed the law was or should be different (R. 378:9-10).

In sum, the subjects covered by the questions requested by the defendant were sufficiently covered during the court's voir dire, which afforded defendant an adequate opportunity to evaluate the jury on for-cause and peremptory.

B. The Court Properly Denied the For-Cause Challenge Because the Juror Demonstrated the Ability to be Fair and Impartial; Using a Peremptory Challenge to Remove the Juror did not Result in an Impartial Jury.

Defendant challenged prospective juror Steven Wright for cause because Wright had a brief acquaintance with Detective Nudd many years earlier (R. 401A:264-66, attached at Addendum B). On appeal, defendant argues the trial court prejudicially erred in denying his for-cause challenge to the juror, against whom defendant used his first peremptory strike (R. 401A:267; R. 200). Br. of App. at 20-21.[7]

A for-cause challenge is allowed under rule 18, Utah Rules of Criminal Procedure,

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[7] Although not clearly articulated on appeal, the State acknowledges that defendant's claim of prejudice was arguably preserved by trial counsel's not only using a peremptory strike against the challenged juror, but by noting that she would have used a peremptory strike against juror Michael Steele if she had any remaining (R. 401A:75-76). See State v. Baker, 935 P.2d 503, 508 (Utah 1997) ("'Initially, a defendant must establish that he or she exercised a peremptory challenge to remove the juror [properly removable for cause], exhausted the defendant's peremptory challenges, and communicated to the trial court the defendant's dissatisfaction with the jury selected.'") (quoting People v. Crittenden, 885 P.2d 887, 906-07 (Cal. 1994).

when there is an

> "*existence* of any social, legal business, fiduciary, or other *relationship* between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship, when viewed *objectively*, would suggest to *reasonable minds* that the prospective juror would be *unable or unwilling* to return a verdict which would be free of favoritism."

U.R.Cr. P. 18(e)(4)(1998) (emphasis added). See State v. Lacey, 665 P.2d 1311, 1312 (Utah 1983) (footnote omitted) (only "strong and deep impressions" on the part of a potential juror serve as the basis of a for cause removal) (citation omitted).

In State v. Cobb, 774 P.2d 1123 (Utah 1989), the juror had known the prosecutor fifteen years before when he was a senior in high school for about a year, during which time the juror's daughter and the prosecutor were friends. Id. at 1126. Additionally, the juror's and the prosecutor's families belonged to the same church organization, and she remembered him as a "nice kid." Id. The court found that the juror's brief acquaintance with the prosecutor was "not the type of relationship that would warrant an inference of bias, especially in light of a later statement where she expressed no doubts about her ability to decide the case impartially . . . ." Id. See also State v. Hewitt, 689 P.2d 22, 25-26 (Utah 1984) (no abuse of discretion in denying challenge for cause to juror who had gone to high school twenty years previously with one of the detectives on the case); Lacey, 665 P.2d at 1312 (rejecting for-cause challenge to juror recently receiving medical treatment from prosecution witness, where although juror stated that "there was a 'possibility' he might attach more credibility to his acquaintances' testimony than to

another person he did not know[,]" he "consistently stated that he would fairly weigh their testimony along with all the other testimony presented").

Wright was a student of Detective Nudd's fourteen or fifteen years earlier in an intensive physical training program (R. 401A: 264-66). Although Wright suggested he might have borne Detective Nudd some ill feeling during the program because of its extreme demands, he was later grateful for having gone through it (R. 401A:264-65). In answer to whether he held Detective Nudd in such high esteem that it would prevent him from being fair and impartial, Wright responded: "I wouldn't say that. I can be fair and impartial through all of that" (R. 401A:266). It is plain from Wright's limited association with Detective Nudd, which actually contained an element of ill-feeling, coupled with his ready assertion that he would not be biased in favor of the detective's testimony, that the trial court did not abuse its discretion in denying the for-cause challenge.

POINT III - BECAUSE RULE 106, UTAH RULES OF EVIDENCE, DOES NOT APPLY TO THIS CASE, THE COURT DID NOT ABUSE ITS DISCRETION IN LIMITING DETECTIVE NUDD'S TESTIMONY, WHICH ACCURATELY REPRESENTED DEFENDANT'S POST-ARREST STATEMENT AND WAS EVEN LESS DAMAGING THAN DEFENDANT'S COMPLETE STATEMENT

A. Factual Background.

At trial, Detective Nudd testified concerning remarks defendant made to him during a post-arrest interview at the police department later the night of the assault:

> A. He told me that after the shooting started, [] felt there just wasn't anything he could do so he continued in the car with them and once the accident happened, he said that he was with them, and once they started assaulting [the victim], he said he felt like he didn't want to be a punk and support his friends, but he didn't know whether or not to do anything to the guy.
>
> Q. Did he say he didn't want to be a punk and just stand there and not do anything?
>
> A. Yes.

R. 379:39-40.

Anticipating that defendant would attempt to introduce portions of the transcribed record of that interview, prior to Detective Nudd's testifying the prosecution moved to exclude those recorded statements as self-serving hearsay (R. 379:2-6, attached at Addendum C). In response, defendant argued that he should be allowed to introduce other parts under rule 106, Utah Rules of Evidence (R. 379:4).[8] Although the trial court

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[8] Although not explicit in the record (R. 379:4), it is evident that defense counsel was referring to the following portion of defendant's recorded statement:

recognized that it could not definitively rule until Detective Nudd actually testified, it agreed with the prosecution that because the prosecution expected only to elicit Detective Nudd's *testimony* of the interview and not defendant's actual *recorded statement*, rule 106 was inapplicable on its express language, and that fairness argued in favor of excluding the recorded statements (R. 379:2-3, 6-7). On appeal, defendant claims the trial court failed to apply the "rule of completeness" embodied in rule 106. Br. of App. at 21-30.

B. Rule 106 Neither Applies to Oral Statements, nor Sanctions the Admission of Inadmissible Hearsay.

Rule 106 of the Utah Rules of Evidence states:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in

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> Defendant: You know what, you tell the truth, you doin something you don't feel like doing, like this situation when I was driving and you know something is wrong but you can't do nothing about it because you in it already, you know. That's the only feeling that was hitting me when they were beating up the man, you know, when I see the two of them going at it beating up a man not even a man just another person too, another white man[] with long hair, it wasn't really hard for me to try to hold them back because they are my friends and when they beat the man down, you know what my feeling was, you know, should I help them beat up the man or should I just stand here, I don't want to be a punk and just stand there and not doing nothing and that was the only thing on my mind. If I wasn't the one that was shooting, I wasn't the one driving, I would probably of beat the man. I know since I tell the truth, that everybody over there that seeing the thing, the witnesses over there that would recognize me from when they were beating up the man, they know that I wasn't laying a hand on nobody that I was trying to hold my boy back, the big one, the one owned the car. This was enough you know other people around. I know that I was drunk you know. But then again I know what I was doing.

(R. 401:30-31).

fairness to be considered contemporaneously with it.

Utah R. Evid. 106.

There are no decisions from the Utah courts interpreting this rule. However, "[t]his rule is the federal rule, verbatim." See Utah R. Evid. 106 advisory committee note. Since the rules are identical, federal interpretations of the rule are persuasive. State v. Smith, 817 P.2d 828, 829 (Utah Ct. App. 1991).

"For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations." 1972 Advisory committee notes. See also J.Weinstein, M. Berger, & J. McLaughlin, Weinstein's Evidence ¶ 106[01] at. p. 106-4 ("Rule106 has been limited to writings and recorded statements."). Defendant cites only a single relevant case for the application of rule 106 in the circumstances of this case. Br. of App. at 25.[9] However, substantial federal authority indicates that rule 106 is not applicable on

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[9] Defendant cites United States v. Haddad, 10 F.3d 1252, 1258-59 (7th Cir. 1993) (equating rule 106 with rule 611(a), Federal Rules of Evidence, and thereby recognizing admissibility of exculpatory oral statement made to police officer to correct a purported false inference of guilt). Other cases cited by defendant, see Br. of App. at 24-26, are distinguishable because they involve recorded statements. See United States v. Rubin, 609 F.2d 51, 57-63 (2nd Cir. 1979) (the defendant's extensive reading of agent's notes into record justified limited introduction by prosecution of limited portions of notes under rule 106), aff'd, 449 U.S. 424, 101 S. Ct. 698 (1981); Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1529 n.11 (11th Cir. 1986) (two paragraphs of letter published to jury required publishing other related paragraphs), aff'd en banc, 827 F.2d 1498, 1499 (1987), rev'd in part on other grounds, 488 U.S. 153, 109 S. Ct.439 (1988); United States v. Walker, 652 F.2d 708, 709-713 (7th Cir. 1981) (admission of inculpatory portions of defendant's testimony at his first trial required admission of additional portions at second trial); State v. Dunkley, 39 P.2d 1097, 1105-06 (Utah 1935) (entire post-arrest interview properly placed in evidence following introduction of transcribed interview by prosecution).

its plain language to oral statements.[10] At trial, Detective Nudd had with him defendant's transcribed post-arrest interview (R. 379:28-29, 32). However, he testified about the interview from his memory, which was refreshed only twice by reference to the transcription, and read into the record a only once a portion of the interview unrelated to the purportedly misleading statement claimed on appeal (R. 379:32, 36, 38-39). The prosecutor never introduced either the transcript or the recorded interview into evidence (Exhibit list, R. 197-98).

Furthermore, even if the rule did apply, it would not serve to admit inadmissible hearsay. Detective Nudd's testimony about defendant's post-arrest statements about his involvement in the assault were admissible as nonhearsay. See Utah R. Evid. 801(d)(2)(A) (admission of party opponent offered against the party). However, as the trial court noted, the same provision did not permit defendant to introduce other portions of his statement (R. 379:3), and defendant offered no other basis for admission other than

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[10] See United States v. Ramirez-Perez, 166 F.3d 1106, 1112-13 (11th Cir. 1999) (transcribed interview inadmissible under rule 106 to rebut government agent's oral statements regarding interview); Howard v. Moore, 131 F.3d 399, 415 (4th Cir. 1997) (declining to apply rule of completeness under rule 106 where the defendant's confessions, although transcribed by government agents, were not introduced into evidence in written form); United States v. Collicott, 92 F.3d 973, 983 (9th Cir. 1996) (recognizing rule 106 inapplicable because no writing or recorded statement was introduced by a party); United States v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996), cert. denied, __ U.S. __, 118 S. Ct. 341 (1997) ("The rule applies only to writings or recorded statements, not to conversations," citing Fed.R.Evid. 106, advisory committee notes); United States v. Harvey, 959 F.2d 1371, 1375 (7th Cir. 1992) ("Rule 106 . . . applies only to written and recorded materials."); United States v. Bigelow, 914 F.2d 966, 972 (7th Cir.1990), cert. denied, 498 U.S. 1121, 111 S.Ct. 1077 (1991) (same); United States v. Terry, 702 F.2d 299, 314 (2nd Cir.), cert. denied, 461 U.S. 931 (1983) (admission was not mandated rule 106 since it applies only to writings, not oral statements).

rule 106 (R. 379:4). Although defendant again cites only a single case for the proposition that the rule of completeness, as embodied in rule 106, allows the admission of otherwise inadmissible evidence,[11] substantial and recent federal authority is contrary.[12] Therefore, the rule of completeness, as expressed in rule 106, does not apply to this case, and the trial court did not abuse its discretion in refusing to admit additional transcribed portions of the interview. Even if the rule did apply, the trial court still did not abuse its discretion in refusing admission of additional portions of the recorded interview.

C. Purported Exculpatory Portions of Defendant's Post-Arrest Interview would not Materially Clarify Detective Nudd's Testimony.

"Although different circuits have elaborated on rule 106's "fairness" standard in different ways . . . common to all is the requirement that the omitted portion be relevant and 'necessary to qualify, explain, or place into context the portion already introduced.'" United States v. Branch, 91 F.3d 699, 728 (5th Cir. 1996) (citations omitted).

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[11] See United States v. Sutton, 801 F.2d 1346, 1368-69 (D.C. Cir. 1986) (rule 106, in contradistinction to all the other rules of evidence, should not be restrictively construed to exclude otherwise inadmissible evidence).

[12] See Collicott, 92 F.3d at 983 (rejecting admission under rule 106 of inadmissible hearsay); Wilkerson, 84 F.3d at 696 (4th Cir.1996) (rule 106 does "not render admissible the evidence which otherwise is inadmissible under hearsay rules") (citing United States v. Woolbright, 831 F.2d 1390, 1395 (8th Cir. 1987) (noting neither rule 106 nor rule 611 authorizes a court to admit unexcepted hearsay); Phoenix Associates III v. Stone, 60 F.3d 95, 103 (2nd Cir.1995) ("Rule 106 'does not compel admission of otherwise inadmissible hearsay evidence.'") (quoting United States Football League v. National Football League, 842 F.2d 1335, 1375-76 (2nd Cir.1988)); United States v. Burreson, 643 F.2d 1344, 1349 (9th Cir.1981) (court did not abuse its discretion in excluding evidence under rule 106 because it was irrelevant and inadmissible hearsay), cert. denied, 454 U.S. 830, 102 S.Ct. 125, 454 U.S. 847, 102 S.Ct. 165, 135 (1981); United States v. Costner, 684 F.2d 370, 373 (6th Cir.1982); see also 1 J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 106[02] at p. 106-12 (1985) (rule 106 addresses only an order of proof problem and does not make admissible what is otherwise inadmissible).

On direct examination, Detective Nudd testified that during defendant's post-arrest interview defendant first gave a false story, asserting that he had never been in Edwin Seumanu's car, that he was merely a witness to the events, that he had wrested the gun from Edwin, and that he interceded to break up the fight (R. 379:29-34). When informed that his conversation with Viliamu in the patrol car had been tape recorded, defendant asserted he would then tell the truth, acknowledging that he had been the driver of the Monte Carlo, but again claiming that he had tried to pull the Seumanu brothers off the victim (R. 379:38-39). When asked what defendant said about his feelings at the end of the interview, Detective Nudd answered:

> A. He told me that after the shooting started, felt there just wasn't anything he could do so he continued in the car with them and once the accident happened, he said that he was with them, and once they started assaulting [the victim], he said he felt like he didn't want to be a punk and support his friends, but he didn't know whether or not to do anything to the guy.
>
> Q. Did he say he didn't want to be a punk and just stand there and not do anything?
>
> A. Yes.

R. 379:39-40. Thus, in essence, Detective Nudd testified that defendant was purporting to tell the truth when he repeatedly stated that although he had tried to break up the attack on Brems, because he was with friends he felt ambivalent about whether to join in the assault or to refrain.

Defendant, however, asserts that Detective Nudd's final testimony led the jury to

the mistaken inference that he must have participated in the assault and that the only way to correct this mistaken inference was by introducing his complete statement made at the end of his interview:

> Defendant: You know what, you tell the truth, you doin something you don't feel like doing, like this situation when I was driving and you know something is wrong but you can't do nothing about it because you in it already, you know. That's the only feeling that was hitting me when they were beating up the man, you know, when I see the two of them going at it beating up a man not even a man just another person too, another white man[] with long hair, ***it wasn't really hard for me to try to hold them back because*** they are my friends and when they beat the man down, ***you know what my feeling was, you know, should I help them beat up the man or should I just stand here, I don't want to be a punk and just stand there and not doing nothing*** and that was the only thing on my mind. If I wasn't the one that was shooting, I wasn't the one driving, I would probably of beat the man. ***I know since I tell the truth, that everybody over there that seeing the thing, the witnesses over there that would recognize me from when they were beating up the man, they know that I wasn't laying a hand on nobody that I was trying to hold my boy back, the big one, the one owned the car.*** This was enough you know other people around. I know that I was drunk you know. But then again I know what I was doing.

(R. 401:30-31) (emphasis added in Br. of App. at 28).

It is plain that, since Detective Nudd had already testified to defendant's repeated assertions that he had attempted to break up the fight, this expanded statement adds nothing "necessary to qualify, explain, or place into context the portion already introduced," see Branch, 91 F.3d at 728, but rather was cumulative. Indeed, the detective's testimony accurately and concisely summarized defendant's ambivalence about joining the assault, an expression manifest in defendant's transcribed statement.

Even if the court abused its discretion in not allowing the introduction of

defendant's transcribed statement, any error was harmless. See Haddad, 10 F.3d at 1259 (improper exclusion under rule 106 harmless where the same information was later elicited from a witness). On cross examination, Detective Nudd testified further as to defendant's post-arrest statements, reading directly from the transcript:

> I know since I tell the truth that everybody over there that seen the thing, the witnesses that were over there, that would recognize me from when they were beating up the man. They know that I wasn't laying a hand on nobody. That I was trying to hold my boy back, the big one. The one that owned the car.

(R. 379:66). These statements fully express defendant's claim that he tried to hold Edwin back, and thus defendant fully achieved his objective in having additional statements introduced in evidence. Additionally, defendant testified on his own behalf that he pulled Edwin and Viliamu off Brems after they started to beat him (R. 381:35-41).

Finally, the entire statement given to Detective Nudd by defendant would be more harmful to defendant than the portions that were admitted. Defendant spent the majority of the interview denying he was ever in the car and then altering his story (R. 401: 1-19), a far more prejudicial outcome than the omission of cumulative evidence. In sum, any abuse of discretion in omitting the any portions of the post-arrest interview was harmless.

POINT IV - DISPOSITION ON DEFENDANT'S CHALLENGES TO UTAH CODE ANN. § 76-3-203.1 (1995) SHOULD BE DEFERRED UNTIL THE UTAH SUPREME COURT RULES ON THE STATE'S PETITION FOR REHEARING IN STATE V. LOPES; ALTERNATIVELY, ANY ERROR AS A CONSEQUENCE OF LOPES IS HARMLESS BEYOND A REASONABLE DOUBT

Defendant challenged Utah Code Ann. § 76-3-203.1 (1995) ("group criminal

activities" enhancement), on a variety of state and federal constitutional and statutory grounds (R. 256-97). The trial court rejected defendant's arguments (R. 369-73), and imposed an enhanced sentence (Findings of Fact and Conclusions of Law Re: Application of Utah Code Ann. § 76-3-203.1, "Findings," R. 303-05). On appeal, defendant renewed those challenges . Br. of App. at 30-48.

On March 16, 1999, the Utah Supreme Court issued State v. Lopes, No. 960551 (Utah March 16, 1999). The court concluded that section 76-3-203.1(1), providing for an enhanced sentence if a person acted "in concert" with "two or more other persons who would be criminally liable for the offense as parties under section 76-2-202," requires that "all three actors must (i) have possessed a mental state sufficient to commit the same underlying offense and (ii) have directly committed the underlying offense or solicited, requested, commanded, encouraged, or intentionally aided one of the other two actors to engage in conduct constituting the underlying offense. Lopes, slip op. at 5.[13] In essence, the court concluded, section 76-3-203.1(1), created a new crime which required proof to a jury beyond a reasonable doubt. Lopes, slip op. at 6-7. Consequently, the court held section 76-3-203.1(5)(c), providing for the trial court's imposing the enhancement upon a sufficient finding, unconstitutional. Lopes, slip op. at 8.

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[13] Utah Code Ann. § 76-2-202 (1995) provides that: "Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct."

On March 30, 1999, the State petitioned the Utah Supreme Court for rehearing in Lopes. In the interest of judicial economy, the State respectfully requests that this Court defer its disposition of defendant's challenges to the group criminal activities enhancement until the supreme court has ruled on the State's petition.[14]

Alternatively, the State asserts that any error in imposing the group criminal activities enhancement following Lopes is harmless beyond a reasonable doubt. Although Lopes now requires that a jury find the "in concert" offense beyond a reasonable doubt, the jury in this case was not so instructed. However, defendant was convicted by a jury beyond a reasonable doubt of aggravated assault (R. 351) on evidence that undeniably showed the primary participation of the Seumanu brothers. Edwin Seumanu admitted at trial to being involved in the victim's beating and pleading guilty to attempted homicide (R. 379:64, 110). Without objection, the prosecutor proffered at defendant's sentencing that both Edwin ***and*** Viliamu Seumanu pleaded guilty in this matter (R. 380:13). Since all three defendant's were determined guilty of some offense related to the assault at the time defendant was sentenced, Lopes' requirement of a jury determination of guilt of all those acting in concert beyond a reasonable doubt is fulfilled.

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[14] This Court has already substantially acknowledged the propriety of State's request. In State v. Cheeney, No. 970415-CA (Utah App. April i, 1999), this Court stayed for many months consideration of the defendant's challenges to section 76-3-203.1 in recognition that Lopes would be dispositive. Although the Court issued an unpublished opinion based on Lopes, it *sua sponte* stayed the remittitur in that case pending disposition of the State's petition for rehearing in Lopes.

Lopes, however, also requires that all those acting in concert have the mental intent to commit "the ***same*** underlying offense" and they actually act as parties under section 76-2-202 to the same offense. Lopes, slip op. at 5. Interpreted literally, this requirement would preclude imposition of the enhancement on the facts of this case. However, Lopes cited with approval and declined to overrule State v. Alvarez, 872 P.2d 450 (Utah 1994), wherein the court stated: "Party liability under section 76-2-202 ***does not*** require that the persons involved in the criminal conduct have the same mental state." Id. at 461 (emphasis added). Relying on State v. Crick, 675 P.2d 527 (Utah 1983), Alvarez further asserted:

> "A defendant can be criminally responsible for an act committed by another, but the degree of his responsibility is determined by his own mental state in the acts that subject him to such responsibility, not by the mental state of the actor. This is clear from the language of § 76-2-202." [Crick] at 534. ***Thus, three persons can be parties to the same criminal conduct and each have a different mental state.*** [Emphasis added.]

Id. at 461.

Given that Lopes has declined to overrule Alvarez, it may well be that Lopes' reference to "the same underlying offense" refers not to precisely the same criminal offense, but rather the same unlawful incident in connection with which the parties may have different mental states.[15] Under that interpretation, and given the admitted (plea) or proven culpability of all those acting in concert in this case, any error in not finding

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[15] This point is included in the State's petition for rehearing in Lopes.

defendant and the Seumanu brothers guilty of "in concert" crime at trial is harmless beyond a reasonable doubt.

POINT V - BECAUSE CONSPIRACY AND COMPLICITY ARE DISTINGUISHABLE, THE SHONDEL RULE DOES NOT APPLY IN THIS CASE

In State v. Shondel, the Utah Supreme Court held that when two statutes proscribe the same criminal conduct, the lesser of the two punishments should be imposed. State v. Shondel, 453 P.2d 146, 147-48(Utah 1969). Defendant asserts that section 76-3-203.1, proscribing "in concert" criminal activity, and Utah Code Ann. § 76-4-201 (1995), proscribing conspiracy, make criminal the same conduct. Br. of App. at 48. However, he argues, because conviction of a second degree felony results in an enhanced six year minimum term, whereas conviction for conspiracy to commit a second degree felony results in a maximum zero-to-five year term, he should have been sentenced to only the latter term.[16] Even assuming the authority of Lopes, concluding that in concert criminal liability constitutes a new crime, defendant's argument misapprehends the nature of conspiracy and accomplice liability.

The inquiry under Shondel focuses on "'whether the . . . statutes at issue proscribe exactly the same conduct, i.e., do they contain the same elements?'" Kent, 945 P.2d at

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[16] See Utah Code Ann. § 76-3-203.1(3)(d) (1995) ("If the offense is a second degree felony, the convicted person shall be sentenced to an enhanced minimum term of six years in prison."); Utah Code Ann. § 76-4-202(3) (Supp. 1998) ("Conspiracy to commit . . . (3) a second degree felony is a third degree felony")(3) (Supp. 1998) ("Conspiracy to commit . . . (3) a second degree felony is a third degree felony.").

147 (quoting State v. Gomez, 722 P.2d 747, 749 (Utah 1986)). "If the statutes do not require proof of the same elements, the defendant may be charged under the statute carrying the more severe sentence." Fisher, 972 P.2d at 98 (citing Kent, 945 P.2d at 147).

"[A] person is guilty of conspiracy when he, intending that conduct constituting a crime be performed, agrees with one or more persons to engage in or cause the performance of such conduct . . . . Utah Code Ann.§ 76-4-201 (1995). In cases too numerous to cite courts have recognized that the gravamen of conspiracy is the ***agreement*** to commit the criminal act.[17] Accomplice liability, on the other hand, requires not an agreement, but rather only that a party act as an aider and abettor, to wit: that he directly commit the offense or "solicit[], request[], command[], encourage[], or intentionally aid[] another person to engage in conduct which constitutes an offense." Utah Code Ann. § 76-2-202 (1995). This distinction, plain on the face of the statutes, has been recognized in other jurisdictions. See People v. Luparello, 231 Cal.Rptr. 832, 849 (Cal. Ct. App. 1987) ("[T]he conspirator need only intend to agree or conspire and to commit the offense which is the object of the conspiracy . . . while the aider and abettor must intend to commit the offense or to encourage or facilitate its commission.") (citations omitted); State ex rel. Woods v. Cohen, 844 p.2d 1147, 1150

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[17] See, e.g., United States v. Jobe, 101 F.3d 1046, 1061 (5th Cir. 1996) ("[T]he gravamen of [conspircy] is the agreement to commit a crime."); United States v. Burgos, 94 F.3d 849, 857 (4th Cir. 1996) (same).

(Ariz. 1992) (recognizing "a logical distinction between *agreeing to the commission of a crime by another and agreeing to aid another in committing a crime,* the latter being more participatory than the former) (emphasis in original).[18]

The facts of this case do not indicate any plan or agreement among defendant and the Seumanus to commit an assault. Rather, the offense was spontaneously committed by all three participatnts. Because proof of conspiracy would require the proof of an additional criminal element, the Shondel rule does is inapplicable.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests that defendant's conviction be affirmed.

RESPECTFULLY SUBMITTED this 19th day of April, 1999.

JAN GRAHAM
Attorney General

KENNETH A. BRONSTON
Assistant Attorney General

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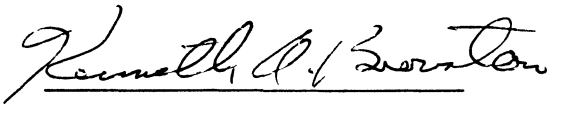
[18] At oral argument in Lopes, the court considered the argument that the group criminal activities enhancement actually constituted conspiracy. However, it is evident from the issued decision that an "agreement" to commit an offense is not an element of the new crime of "in concert" criminal liability that the court has constructed. Lopes, slip op. at 5 (stating only that those acting in concert must have the mental intent to commit the same offense and act as aiders or abettors in the commission of the offense).

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Robert K. Heineman and Lisa J. Remal, Salt Lake Legal Defender Assoc., attorneys for appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 19th day of April, 1999.



ADDENDA

ADDENDUM A

76-1-601. Definitions.

Unless otherwise provided, the following terms apply to this title:

(1) "Act" means a voluntary bodily movement and includes speech.

(2) "Actor" means a person whose criminal responsibility is in issue in a criminal action.

(3) "Bodily injury" means physical pain, illness, or any impairment of physical condition.

(4) "Conduct" means an act or omission.

(5) "Dangerous weapon" means:

(a) any item capable of causing death or serious bodily injury; or

(b) a facsimile or representation of the item; and:

(i) the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury; or

(ii) the actor represents to the victim verbally or in any other manner that he is in control of such an item.

(6) "Offense" means a violation of any penal statute of this state.

(7) "Omission" means a failure to act when there is a legal duty to act and the actor is capable of acting.

(8) "Person" means an individual, public or private corporation, government, partnership, or unincorporated association.

(9) "Possess" means to have physical possession of or to exercise dominion or control over tangible property.

(10) "Serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.

(11) "Substantial bodily injury" means bodily injury, not amounting to serious bodily injury, that creates or causes protracted physical pain, temporary disfigurement, or temporary loss or impairment of the function of any bodily member or organ.

(12) "Writing" or "written" includes any handwriting, typewriting, printing, electronic storage or transmission, or any other method of recording information or fixing information in a form capable of being preserved.

76-2-202. Criminal responsibility for direct commission of offense or for conduct of another.

Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

76-3-203.1. Offenses committed by three or more persons — Enhanced penalties.

(1) (a) A person who commits any offense listed in Subsection (4) in concert with two or more persons is subject to an enhanced penalty for the offense as provided below.

(b) "In concert with two or more persons" as used in this section means the defendant and two or more other persons would be criminally liable for the offense as parties under Section 76-2-202.

(2) (a) The prosecuting attorney, or grand jury if an indictment is returned, shall cause to be subscribed upon the complaint in misdemeanor cases or the information or indictment in felony cases notice that the defendant is subject to the enhanced penalties provided under this section. The notice shall be in a clause separate from and in addition to the substantive offense charged.

(b) If the subscription is not included initially, the court may subsequently allow the prosecutor to amend the charging document to include the subscription if the court finds the charging documents, including any statement of probable cause, provide notice to the defendant of the allegation he committed the offense in concert with two or more persons, or if the court finds the defendant has not otherwise been substantially prejudiced by the omission.

(3) The enhanced penalties for offenses committed under this section are:

(a) If the offense is a class B misdemeanor, the convicted person shall serve a minimum term of 90 consecutive days in a jail or other secure correctional facility.

(b) If the offense is a class A misdemeanor, the convicted person shall serve a minimum term of 180 consecutive days in a jail or other secure correctional facility.

(c) If the offense is a third degree felony, the convicted person shall be sentenced to an enhanced minimum term of three years in prison.

(d) If the offense is a second degree felony, the convicted person shall be sentenced to an enhanced minimum term of six years in prison.

(e) If the offense is a first degree felony, the convicted person shall be sentenced to an enhanced minimum term of nine years in prison.

(f) If the offense is a capital offense for which a life sentence is imposed, the convicted person shall be sentenced to a minimum term of 20 years in prison.

(4) Offenses referred to in Subsection (1) are:

(a) any criminal violation of Title 58, Chapter 37, 37a, 37b, or 37c, regarding drug-related offenses;

(b) assault and related offenses under Title 76, Chapter 5, Part 1;

(c) any criminal homicide offense under Title 76, Chapter 5, Part 2;

(d) kidnapping and related offenses under Title 76, Chapter 5, Part 3;

(e) any felony sexual offense under Title 76, Chapter 5, Part 4;

(f) sexual exploitation of a minor as defined in Section 76-5a-3;

(g) any property destruction offense under Title 76, Chapter 6, Part 1;

(h) burglary, criminal trespass, and related offenses under Title 76, Chapter 6, Part 2;

(i) robbery and aggravated robbery under Title 76, Chapter 6, Part 3;

(j) theft and related offenses under Title 76, Chapter 6, Part 4;

(k) any fraud offense under Title 76, Chapter 6, Part 5, except Sections 76-6-503, 76-6-504, 76-6-505, 76-6-507, 76-6-508, 76-6-509, 76-6-510, 76-6-511, 76-6-512, 76-6-513, 76-6-514, 76-6-516, 76-6-517, 76-6-518, and 76-6-520;

(l) any offense of obstructing government operations under Part 3, Title 76, Chapter 8, except Sections 76-8-302, 76-8-303, 76-8-304, 76-8-307, 76-8-308, and 76-8-312;

(m) tampering with a witness or other violation of Section 76-8-508;

(n) extortion or bribery to dismiss criminal proceeding as defined in Section 76-8-509;

(o) any explosives offense under Title 76, Chapter 10, Part 3;

(p) any weapons offense under Title 76, Chapter 10, Part 5;

(q) pornographic and harmful materials and performances offenses under Title 76, Chapter 10, Part 12;

(r) prostitution and related offenses under Title 76, Chapter 10, Part 13;

(s) any violation of Title 76, Chapter 10, Part 15, Bus Passenger Safety Act;

(t) any violation of Title 76, Chapter 10, Part 16, Pattern of Unlawful Activity Act;

(u) communications fraud as defined in Section 76-10-1801;

(v) any violation of Title 76, Chapter 10, Part 19, Money Laundering and Currency Transaction Reporting Act; and

(w) burglary of a research facility as defined in Section 76-10-2002.

(5) (a) This section does not create any separate offense but provides an enhanced penalty for the primary offense.

(b) It is not a bar to imposing the enhanced penalties under this section that the persons with whom the actor is alleged to have acted in concert are not identified, apprehended, charged, or convicted, or that any of those persons are charged with or convicted of a different or lesser offense.

(c) The sentencing judge rather than the jury shall decide whether to impose the enhanced penalty under this section. The imposition of the penalty is contingent upon a finding by the sentencing judge that this section is applicable. In conjunction with sentencing the court shall enter written findings of fact concerning the applicability of this section.

(6) The court may suspend the imposition or execution of the sentence required under this section if the court:

(a) finds that the interests of justice would be best served; and

(b) states the specific circumstances justifying the disposition on the record and in writing.

76-4-201. Conspiracy — Elements of offense.

For purposes of this part a person is guilty of conspiracy when he, intending that conduct constituting a crime be performed, agrees with one or more persons to engage in or cause the performance of such conduct and any one of them commits an overt act in pursuance of the conspiracy, except where the offense is a capital offense, a felony against the person, arson, burglary, or robbery, the overt act is not required for the commission of conspiracy.

76-4-202. Conspiracy — Classification of offenses.

Conspiracy to commit:

(1) a capital felony is a first degree felony;

(2) a first degree felony is a second degree felony; except that conspiracy to commit child kidnaping, in violation of Section 76-5-301.1 or to commit any of those felonies described in Title 76, Chapter 5, Part 4, which are first degree felonies, is a first degree felony punishable by imprisonment for an indeterminate term of not less than three years and which may be for life;

(3) a second degree felony is a third degree felony;

(4) a third degree felony is a class A misdemeanor;

(5) a class A misdemeanor is a class B misdemeanor;

(6) a class B misdemeanor is a class C misdemeanor;

(7) A class C misdemeanor is punishable by a penalty not exceeding one half the penalty for a class C misdemeanor.

76-5-103. Aggravated assault.

(1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:

(a) intentionally causes serious bodily injury to another; or

(b) under circumstances not amounting to a violation of Subsection (1)(a), uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury.

(2) A violation of Subsection (1)(a) is a second degree felony.

(3) A violation of Subsection (1)(b) is a third degree felony.

Rule 106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

ADDENDUM B

chambers panel member No. 8, Steven Richard Wright. Mr. Wright, in court, sir, I believe you responded to a question wherein you stated that you know or have some familiarity with Det. Nudd. Was that your response?

A. Yes, sir.

Q. How do you know Det. Nudd?

A. It was about 14 years ago, 15 years ago, I was part of an explorer program that he was an advisor of at the time.

Q. How long ago you say?

A. 14 or 15 years ago.

Q. And please forgive my ignorance. When you were in an explorer program 14 years ago, how regularly would you meet with Det. Nudd?

A. I was only involved with him. It was they called it an academy-type thing. I was actually with Sandy City explorer and he was with West Valley and they combined the two for approximately a month and a half period of time. Everyday for that period of time just to give us the basics of law enforcement and stuff at the time. That is the only time I ever really been around him.

Q. Since that experience, have you had any contact with Det. Nudd?

A. No, sir.

Q. How many kids were in the program?
A. Quite a few. I would say probably around 50.
Q. Did you say you were the Sandy?
A. Sandy City, yes.
Q. So what occasion did Det. Nudd have to supervision your work?
A. He was our physical education instructor and he also instructed a few of the classes that were taught. Specifically, I can't remember.
Q. It is not a situation where you get graded or anything of that nature, is it?
A. We were graded on our tests and our performance and everything. We received a fancy piece of paper at the end of it, but nothing else.
Q. As a result of that experience, how old were you then?
A. I was 16 or 17 at the time.
Q. As a result of that experience, did you form any opinion or impressions or conclusions about Det. Nudd?
A. I know at the time it was hard because he was pushing us to exercise and stuff real hard at the time, but no, not now. I got over it right after. I realized it was something good that happened to me and not bad.
Q. Did I take from your remarks that at the time you were going through it, it was physically challenging?

A. Very physically challenging for me, yes.

Q. Do you think that you could fairly and impartial evaluate the testimony of Det. Nudd if you were a juror and he were called as a witness?

A. Yes. I hold no grudges or anything like that against him. At the time, it was just emotions with me because we were going through exercising and this, and I wasn't used to it and after the program furnished I was grateful that I was put through that.

Q. Do you hold him in such high esteem that that also would prevent you from being fair and impartial?

A. I wouldn't say that. I can be fair and impartial through all of that.

THE COURT: Thank you very much. (Juror left chambers).

Let's start with you, Mr. Castle. Based on what you have heard so far, I recognize there may be some subsequent answers when we return to court. You wish to challenge Mr. Wright for cause?

MR. CASTLE: No, Your Honor.

THE COURT: Ms. Remal?

MS. REMAL: Your Honor, I would challenge him. It appears to me from what he has told us is though at the time it was a hard thing, and perhaps he didn't like Det. Nudd too much because he pushed them too hard. Shortly

afterwards he realized Det. Nudd did the right thing and challenged him, and he rose to that challenge and thinks highly of him as a result of that.

This is apparently the kind of situation, and I am not familiar with the explorer program, where young people are being taught things by adults and in most situations where that situation occurs the adults are respected and held in high esteem. And for that reason, I am concerned that he would undoubtedly give weight to Det. Nudd's testimony.

THE COURT: The record should reflect that I am going to, at this point anyway, deny the challenge for cause for Mr. Wright. The court is satisfied considering how long ago that experience occurred with Det. Nudd and the panel member's age at the time.

Furthermore, the panel member, in this court's view anyway, was fairly persuasive that he could remain fair and impartial despite the fact that apparently it was a physical task to make it through the exercise explorer program with Det. Nudd teaching it. This court does not believe there is an inadequate basis to challenge him for cause at this point.

You need to bring in panel member No. 13, Ms. Lott. (Pause) The record should reflect we now have in chambers panel member No. 13: Ms. Lot.

ADDENDUM C

statement, I would make another objection to that on different grounds and that is the ground of foundation. At least thus far Officer McCarthy has not identified the names of the individuals or even which individual said the statement or said what part of the statement. And so based on that foundation objection, I renew.

THE COURT: Let me say this. I am going to require Mr. Castle to lay that foundation depending upon what the officer's testimony is. You can chose to renew your objection at that time.

MS. REMAL: Thank you.

THE COURT: Anything else we need to resolve before we bring the jury in?

MR. CASTLE: Your Honor, is that one issue concerning our Motion in Limine, the one involving a request to prohibit defense counsel from asking other witnesses' statements made by the defendant that are considered or would be considered self-serving. I realize in making the motion, I am doing it somewhat in a vacuum because you have yet to hear what those questions are and I understand that.

THE COURT: I do wish to stop you there, if it is okay.

MR. CASTLE: Of course.

THE COURT: You are correct. You are asking me

to do it in a vacuum and I make a point of making it the rare occasion that I rule in a vacuum. It is important for me to hear the question in the context of the testimony so I can determine whether or not there is an appropriate objection or not.

The best I can say to the two of you on this issue is that I have reviewed your Memo and let me say, I didn't review it last night. I actually reviewed it in preparation for, for some reasons, I reviewed it in preparation for trial as to the other two co-defendants. I didn't review it last night but I am familiar with the issue and in general terms since I don't have it in context I would have to say I don't think it constitutes an admission by a party because it would not be offered against the party. It would be offered by Ms. Remal and consequently in this court's view it will still constitute hearsay. That is my view of the issue right now, but I want to be able to rule on the situation question by question.

MR. CASTLE: Your Honor, what I was simply attempting to do is, I think it has been accomplished, is getting the argument out of the way, in terms of just general principles, and go from there. Like I said in chambers, that was the reason I had filed the motion just so that the court knew the State's position so that as

happens occasionally, time is not wasted in discussing the issue, and then discussing the issue in front of the jury. So we can proceed at this point. I am prepared to go forward.

THE COURT: Ms. Remal.

MS. REMAL: Also for the record, as I indicated in chambers, my argument on that issue, and that is about the defendant's statement to Detective Nudd, is that rule 106 governs which is entitled remainder of or related writing or recorded statements, which indicates that when a writing or recorded statement or part thereof is introduced by a party, an adverse party, may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness be considered contemporaneously with it.

It is my understanding that part of the statement that Mr. Castle is going to attempt to elicit from Det. Nudd is in deed part of a video tape statement of an interview between Detective Nudd and Mr. Leleae and that what Mr. Castle wants to do is elicit some parts of that statement, but not allow me to elicit other parts of that statement. And in my view, Rule 106 gives the court at least the discretion to determine whether or not fairness should require that all of the statement be allowed into evidence instead of just one part thereof or some parts.

THE COURT: And I think we should at least place on the record what Mr. Castle's position was as to Rule 106.

MR. CASTLE: Your Honor, it is the State's position Rule 106 does not apply unless I am attempting to actually introduce the recorded statement; i.e., the video tape or a writing which I am not attempting to do. I simply will ask Detective Nudd what statements the defendant made to him.

Now it is true that the police department, out of an effort to document their case, out of an effort to fairness, tape recorded and video recorded the interview with the defendant. I do not believe that 106 was ever intended to cover such an event. And what we are talking about is officers not recording these statements. If the rule -- If a court, if this court rules that somehow Rule 106 supersedes 801(d)2 then I would submit that it simply does not. And it simply is a back door attempt to overcome the fact that the self-serving statements are hearsay. It is an attempt of not requiring the defendant to take the stand and be cross examined as to the veracity of those self-serving statements. That is the purpose for 801(d)2. Not to give the defendant the benefit of having his statements heard and not taking the stand. In other words, having his cake and eat it too.

But if he has self-serving statements to make, then he shouldn't be required to take the stand. Commentators on the Rules of Evidence have long recognized that self-serving statements do not contain the veracity as a statement against a party opponent, when it is offered against that party opponent. But because of the lack of veracity, the requirement is that whoever made that statement, in this context the defendant, he is required to take the stand so he can be tested. And 106 is not an exception 801(d)2. It applies to a different situation than the State plans, applies to a different course of action than the State plans in this case and Rule 106, Your Honor, has been around for some time. I would say long before video tape recordings were around, and I suspect, though I don't know, Rule 106 is based on a former rule prior to the time that we even had tape recorders that were used by law enforcement. So I don't believe that that rule overcomes the hearsay objection that I would have it as well because of the unreliability of self-serving statements. That is our position.

THE COURT: I am going to deny the request for admission under 106. First of all, based upon its express language I am not satisfied it applies. Even if it were to apply, I am of the opinion that the competing interest of -- well, let me restate that.

That the nature of self-serving statements do not persuade this court that I ought to exercise discretion under Rule 106 and allow any remaining portions of the statement to come in because of fairness. In this court's view at this point, the fairness argues in favor of keeping out the self-serving statements. Any other issues we need to resolve before we bring the jury in?

MS. REMAL: Not that I am aware of.

MR. CASTLE: No.

THE COURT: Do we have Officer McCarthy available?

MR. CASTLE: We do, Your Honor.

THE COURT: Let's get the jury in. Let me also tell you that I am expecting to take a shorter lunch break than we did previously. I am going to take a break not longer than 45 minutes. So you need to adjust the calling of your witnesses accordingly. (Pause)

THE COURT: The record by reflect the jury is now present in the courtroom. You may retake the witness stand. You may go forward, counsel.

MR. CASTLE: Your Honor, may I have an exhibit marked?

THE COURT: You may.